

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



May 31, 2005

Agenda ID# 4661
Alternate to Agenda ID# 4508
Ratesetting
6/16/2005 Item # _____

TO: PARTIES OF RECORD IN APPLICATION 04-05-017.

Enclosed is the Alternate Draft Decision of Commissioner Kennedy to the Draft Decision of Administrative Law Judge (ALJ) Thomas, previously mailed to you.

When the Commission acts on the draft or alternate decision, it may adopt all or part of it as written, amend or modify it, or set aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Public Utilities Code Section 311(e) requires that an alternate to a draft decision be served on all parties, and be subject to public review and comment prior to a vote of the Commission. Rule 77.6(d) provides that comments on the alternate draft decision be filed at least seven days before the Commission meeting.

Comments on the alternate decision must be filed and served June 9, 2005. Reply comments are due June 13, 2005.

Pursuant to Rule 77.3 comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service. Please also provide an electronic copy of the comments to Tim Sullivan at TJS@cpuc.ca.gov.

/s/ ANGELA K. MINKIN
Angela K. Minkin
Chief Administrative Law Judge

ANG: cvm

Attachment

Decision ALTERNATE DRAFT DECISION OF COMMISSIONER KENNEDY
(Mailed 5/31/2005)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of WilTel
Communications, LLC (U-6146-C) aka Williams
Communications, LLC, a Delaware Limited
Liability Company, to Amend its Certificate of
Public Convenience and Necessity.

Application 04-05-017
(Filed May 3, 2004)

**OPINION GRANTING APPLICATION OF
WILTEL COMMUNICATIONS LLC TO AMEND ITS
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**

A. Summary

This decision grants the application of WilTel Communications, LLC (WilTel) to amend its certificate of public convenience and necessity (CPCN). WilTel asks us to grant it interim authority, until such time as the Commission can implement new California Environmental Quality Act (CEQA) rules that are applicable to all telecommunications carriers, to build out its fiber optic telecommunications facilities under the same rules that apply to its competitors.

Such allowance would change our current practice with regard to CEQA applicable to WilTel. WilTel explains, correctly, that we have stricter CEQA practices for WilTel than for certain other telecommunications carriers. While the majority of facilities-based carriers are permitted to construct properties within existing rights-of-way (ROW) without having to obtain Commission

approval of the project pursuant to a Commission-triggered CEQA process, WilTel is required to submit a separate CPCN application for each new construction project, whether it is within or outside of existing ROW, regardless of size, and regardless of whether there is any potential for environmental impact. These different requirements have no rational basis.

To correct this inequity, pending the development of a comprehensive environmental policy in R.00-02-003, WilTel will only be granted interim authority to construct its network on the condition WilTel abides by the following restrictions:

1. All construction is no more than five miles in length;
2. All construction is within existing rights-of-way;
3. WilTel notifies the Commission staff of each qualifying construction prior to commencing construction; and
4. WilTel fully complies with any CEQA requirements of local permitting agencies.

During the interim, we will still require WilTel to seek separate Commission approval for new construction projects that are outside existing rights-of-way (ROW) and for any that do not meet the above criteria. This policy will ensure that there is no possibility of environmental harm for projects constructed as we develop a comprehensive environmental policy in R.00-02-003, already opened for just this purpose. Thus, the actions that we take today to end discriminatory treatment of WilTel will not result in any environmental harm.

B. Background

The procedural history of this proceeding shows significant back-and-forth communication between WilTel and Commission staff in an attempt to conform

this application to the currently existing Commission interpretations of its CEQA obligations.

WilTel first filed its application on May 3, 2004. On June 2, 2004, the assigned Administrative Law Judge (ALJ) asked WilTel to supplement its application with more detail about the location and type of construction WilTel planned. On July 9, 2004, WilTel filed the requested supplement. WilTel explained the delay in supplementation on the ground that it “ha[d] not be[en] able to obtain detailed information about its planned construction until only recently.”¹ In the supplement, WilTel asked for blanket approval – without Commission CEQA review – of spurs directly or indirectly connecting WilTel’s fiber optic network to new locations so long as: 1) all construction is no more than five miles in length; 2) all construction is done inside existing rights of way; 3) WilTel notifies the Commission staff of each qualifying construction project prior to commencing construction; and 4) WilTel fully complies with any CEQA review required by local permitting agencies.²

On January 21, 2005, WilTel sent a letter to the Commission stating that, based on recent discussions with [Commission] staff, WilTel determined that it should file a Second Supplement to its Application to modify its request for relief. Specifically, WilTel stated that it would modify its request for relief to adopt programmatic mitigated negative declarations (PND) previously issued by

¹ *Supplement to Application of WilTel Communications, LLC to Amend its Certificate of Public Convenience and Necessity on an Interim Basis and Request for Expedited Ex Parte Relief*, filed July 9, 2004, at 2–3 (First Supplement).

² *Id.* at 3.

the Commission.³ WilTel filed the Second Supplement to its application on January 27, 2005.

On March 8, 2005, WilTel sent another letter to the ALJ withdrawing its Second Supplement and indicating that it wished the Commission to render a decision solely on WilTel's original application and the July 9, 2004 First Supplement.⁴ We analyze the application on that basis below.

WilTel's application is unopposed.

C. Position of WilTel

WilTel has already built certain aspects of its fiber optic telecommunications network in California pursuant to various Commission decisions.⁵ With this application, it seeks that the Commission, consistent with prior Commission CEQA practice, refrain from conducting additional CEQA reviews of spurs directly or indirectly connecting Witless backbone network to new locations, primarily customer premises.

To ensure that its construction activities will produce no environmental harm, WilTel proposes to adhere to certain restrictions. In particular, WilTel states that pending the resolution of the CEQA policy issues under review in R.00-02-003, it asks that the Commission refrain from reviewing only those projects in which:

- All construction is no more than five miles in length;
- All construction is done inside existing rights of way;

³ The January 21, 2005, letter appears as Appendix A to this decision.

⁴ The March 8, 2005, letter appears as Appendix B to this decision. We grant WilTel leave to withdraw the Second Supplement.

⁵ See D.99-05-022, D.99-10-062, D.00-06-035, D.01-08-052 and D.03-03-029.

- WilTel notifies the Commission staff of each qualifying construction project prior to commencing construction; and
- WilTel fully complies with any CEQA review required by local permitting agencies.

WilTel states that construction activities that meet these restrictions will result in no environmental harm.

WilTel notes that we have authorized other carriers to construct new facilities within existing rights of way without obtaining a separate CPCN for each such project. It cites D.95-07-054 as an example.⁶ In addition, WilTel notes that other carriers have absolutely no requirement to return to the Commission for CEQA review and approval of any project.⁷

WilTel also argues that the Commission's current policy of disparate treatment of WilTel compared to other carriers violates § 253 of the Telecommunications Act of 1996. In particular, § 253 demands that "no State ... regulation ... or other State ... legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

D. Discussion

Our analysis of the facts, law and prior decisions concerning WilTel indicates that the policy to require a separate CPCN and separate CEQA review for the construction of modifications and extensions to its network was imposed on WilTel in error, contrary to the conditions of WilTel's CPCN. Moreover, such

⁶ *Comments of WilTel Communications, LLC on Draft Decision of ALJ Thomas in A.04-05-017*, May 5, 2005 at 5.

⁷ *Id.*

an outcome fails to serve the public interest, is arbitrary and capricious because it has no factual or legal basis, and contravenes federal law.

The restrictive policy that the Commission now applies to WilTel did not arise until after D.99-12-050 was issued in the Competitive Local Carrier (CLC) OIR, which set conditions for CPCN's for new CLC's. This decision stopped the process of issuing CPCN's that allowed CLC's to build within ROW's as long the carrier complied with the "batch Mitigated Negative Declarations (MND)" issued to cover such impacts. The MND's were not project specific, but were intended to address the potential impacts for the projects. D.99-12-050 and D.99-10-025 (which deferred granting full facilities based authority to CLC applications filed in the 2nd quarter to 1999) both cited concerns raised by public agencies, including the Department of Justice, about the inadequacy of the prior environmental review process used in granting the CPCN's.

WilTel, however, had applied for a CPCN as an **Interexchange Carrier (IEC)**, not as a CLC, and these decisions concerning CLC's are not applicable to WilTel's CPCN as an IEC. In reviewing prior decisions concerning WilTel, we find that the conditions on WilTel's CPCN were particularly muddled in D.00-08-017. D.00-08-017, cites D.99-10-062, as stating that WilTel's facilities-based authority is "limited to specified construction projects." Unfortunately, our review of D.99-10-062 finds no such restriction, or indeed any use of the words "limited to specified construction projects" anywhere in D.99-10-062. For this reason, we believe that D.00-08-017 erroneously applied intervening decisions concerning CLC's, such as D.99-12-050, to this IEC and "found" a restriction in D.99-10-062, which is not there.

We conclude that there is no legal basis for the administrative imposition of the restriction imposed on WilTel that requires it to obtain a CPCN for each modification to its network.

In addition, even if the Commission had decided to place such a regulatory restriction on this carrier, such a policy, if continued, would constitute a violation of the equal protection clause of the California Constitution⁸ and would be arbitrary and capricious, and thereby constitute a violation of WilTel's right to due process. We reach this result because D.99-05-022 and D.99-10-062, the decisions granting WilTel's CPCN as an IEC, cite no facts that provide a rational basis to support the current practice of requiring more CEQA reviews for WilTel than for other similarly situated carriers. Thus, continuation of these restrictions, even if lawfully adopted, would constitute legal error.

Concerning the effects of reversing our legal error, we note that the current outcome is absurd – we have permitted WilTel to construct a major fiber optic network in California, but have also adopted restrictions that preclude it from effectively competing to attach customers to this major infrastructure network. We note that no party – not even a competitor of WilTel – has opposed this application of WilTel. Reversing this action is clearly in the public interest.

We further note that the criteria enumerated by WilTel, under which we would refrain from reviewing only those projects that meet the narrow set of criteria enumerated above during an interim period until the Commission resolves the contradictions in its CEQA policies, ensure that our limited

⁸ Article 1 Section 7 a states (in relevant part): “A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws;”

modification of WilTel's CPCN will not produce environmental harms. We note that these limitations are more stringent than those currently in place for many IEC's that compete with WilTel. By imposing these criteria, it is certain that projects meeting these criteria will produce no environmental harm. Further, we note that these restrictive criteria are proposed by WilTel, and our adoption should not be interpreted as prejudging any issue before the Commission in R.00-02-003.

In addition to our own analysis of the facts, state law, and Commission precedent, we find WilTel's argument that the Commission's current policy of disparate treatment of WilTel violates § 253 of the Telecommunications Act of 1996 is convincing. We note that in particular, § 253 demands that "no State ... regulation ... or other State ... legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Subjecting WilTel to a regulatory review that adds an average of five-months to any proposal to offer service effectively prohibits WilTel from competing with other carriers lacking this restriction for customers who require new facilities. This contravenes Federal law. Moreover, we find no state law compelling such action.

For all these reasons, we grant WilTel's petition on an interim basis until the Commission develops a non-discriminatory policy in R.00-02-003, a proceeding already opened to address the differences in CEQA policy.

E. Categorization and Need for Hearings

In Resolution ALJ 176-334 dated May 27, 2004, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received.

Given this status public hearing is not necessary and it is not necessary to alter the preliminary determinations made in Resolution ALJ 176-3134.

F. Comments on Draft Decision

The alternate draft decision in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____.

G. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Sarah R. Thomas is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. WilTel seeks that the Commission remove, on an interim basis, the requirement from its CPCN that it obtain prior Commission approval for any new construction project..
2. WilTel requests that the Commission limit its requirement that WilTel obtain prior Commission approval to construction projects outside of existing rights-of-way or construction projects within existing rights-of way more than 5 miles in length.
3. WilTel further proposes to notify the Commission staff in advance of construction of each construction activity that does not require a separate application and certifies that it will fully comply with any CEQA requirements of any local permitting agencies.
4. WilTel requests the modification of its CPCN on an interim basis until such time as a final decision is issued in a CPUC rulemaking, such as R.00-02-003, that establishes new CEQA rules applicable to all telecommunications carriers.

5. We have not resolved the issues addressed herein in R.00-02-003, nor do our interim actions prejudice any final decision in this proceeding.

6. We currently do not conduct CEQA review of individual telecommunications projects constructed within existing rights-of-way for facilities-based carriers receiving authority prior to 1998.

7. WilTel is currently subject to a stricter level of CEQA review by the Commission than the large majority of facilities-based competitors.

8. We find no basis in WilTel's CPCN that supports the Commission's policy of requiring stricter CEQA reviews of WilTel.

9. The record contains no facts that justify the imposition of a stricter level of CEQA review on WilTel.

10. D.00-08-017 errs in stating that D99-10-062 limited WilTel's CPCN to "specified construction projects." That specific language is absent in D.99-10-062 and there is no other language justifying that interpretation.

11. The stricter level of CEQA review places WilTel at a competitive disadvantage because it must obtain Commission approval of proposed projects that its competitors would be able to construct without such review.

12. We can correct this discriminatory treatment by granting the relief requested by WilTel in its Application.

13. Construction of telecommunications facilities within existing rights-of-subject to the restrictions adopted herein will not result in any impact to the environment.

14. WilTel's proposal to provide the Commission staff with advance notice of proposed construction, in combination with the CEQA reviews commonly conducted by local government and other environmental protections, will ensure that no construction is undertaken without appropriate CEQA review.

15. No protests have been filed.

16. A hearing is not required.

Conclusion of Law

1. D.00-08-017 committed legal error when it concluded that D.99-10-062 required WilTel to conduct project-specific CEQA reviews for each project.

2. It is discriminatory and in violation of Article 1 § 7 of the Constitution of California to treat WilTel differently from its competitors.

3. It is within our authority under § 701 of the California Public Utilities Code to modify WilTel's CPCN to remove the requirement on an interim basis that it seek separate CPUC approval for all construction projects so that it will not be discriminated against.

4. The interim protections agreed to by WilTel ensure that its actions pending the Commission's adoption of an industry-wide policy in R.00-02-003 will ensure that its construction activities produce no environmental harm.

5. CEQA is not triggered unless the Commission is required to issue a discretionary decision.

6. The Commission will not be required to issue a discretionary decision for construction activities by WilTel that meet the criteria described in Findings of Fact 2 and 3 above.

7. It is discriminatory and in violation of § 253 of the Telecommunications Act to treat WilTel differently from its competitors.

O R D E R

IT IS ORDERED that:

1. The Application of WilTel Communications, LLC to Amend its Certificate of Public Convenience and Necessity on An Interim Basis and Request for Expedited *Ex Parte* Relief, is granted to the extent discussed herein.

2. WilTel's CPCN is amended as follows: WilTel is not required to submit a CPCN application for construction activities within existing rights of way that are less than five miles in length provided that WilTel notifies the Commission staff of the construction project prior to commencing the construction and WilTel complies with any CEQA requirements of local permitting agencies. For all other projects, WilTel will file a CPCN application prior to commencing construction.

3. The authority granted herein is interim and will expire upon the issuance of a final decision in either R.00-02-003 or similar rulemaking promulgating CEQA rules applicable to all facilities-based telecommunications carriers.

4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties of which an electronic mail address has been provided; this day served a true copy of the original attached Alternate Draft Decision of Commissioner Susan Kennedy on all parties of record for proceeding A.04-05-017 or their attorneys of record.

Dated May 31, 2005 at San Francisco, California.

/s/ CHRISTOPHER V. MEI

Christopher V. Mei

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.